IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.745 OF 2004
IN
C.S. NO.772 OF 2000

Rohini Damji Sidpra .. Appellant.

V/s.

Manilal Kher Ambalal & Co. .. Respondent.

Appellate present in person.

Mr.Ketan Parekh with Mr.Chetan Kapadia i/b. M.K. Ambalal & Co. for the respondent.

CORAM : R.M. LODHA, &
J.P. DEVADHAR, JJ.

DATED : 15TH DECEMBER, 2004.

P.C. :

Heard the appellant in person and Mr.K.D. Parekh, the learned counsel for the respondent.

2. The controversy in the appeal relates to the consideration of issue Nos.12,13,14 and 15 as preliminary issues.

3. The order dated July 3, 2002 inter alia reads thus :

> . "Following issues are framed and settled. On the point of preliminary issues, i.e. issues Nos.12,13,14 and 15

adjourned to 9th September 2002.

12. Whether the suit is barred by the law of Limitation as alleged in paragraph 2 of the Written Statement ?

13. Whether the Plaintiff has no cause of action against the Defendant or whether the plaint discloses no cause of action as alleged in paragraphs 3 and 4 of the Written Statement ?

14. Whether the suit is misconceived and not maintainable as alleged in paragraphs 4 and 5 of the Written Statement ?

15. Whether the suit is bad for non-joinder of necessary parties, as alleged in paragraphs 7 and 8 of the Written Statement ?"

4. On February 24, 2003 when the matter came up before the learned trial Judge, it was observed in the order that issue Nos.12,13,14 and 15 were directed to be heard as preliminary issues. In that order, the learned trial Judge also recorded that the defendants did not propose to give any oral evidence, but the plaintiff wanted to lead oral evidence on these issues and, accordingly the plaintiff was granted time to file affidavit of her evidence in lieu of examination in chief. It appears that accordingly the plaintiff filed her affidavit as her examination in chief and the matter was adjourned for cross examination of the plaintiff.

5. We are afraid Order 14 Rule 2, Civil

Procedure Code does not contemplate the issue of mixed question of fact and law and issue of facts being tried as preliminary issues. On the issues of law question of leading evidence by any of the parties does not arise. However, the fact is that though defendants did not propose to lead evidence on issue Nos.12,13,14 and 15 yet the plaintiff has been permitted to give evidence on these issues by the learned trial Judge.

6. In our considered view the matter requires reconsideration whether issue Nos.12,13,14 and 15 should be tried as preliminary issues, or not. Obviously the learned trial Judge shall keep in mind Order 14 Rule 2 of the Civil Procedure Code while dealing with this aspect.

7. We, accordingly, dispose of the appeal by following order :

i) The learned trial Judge shall reconsider whether issue Nos.12,13,14 and 15 should be tried as preliminary issues.

ii) The contentions of both the parties in this regard are kept open to be

agitated before the learned trial Judge.

iii) We clarify that if any amendment in the issues is required or additional issue needs to be framed, the parties shall be at liberty to apply to the learned trial Judge.

8. Order accordingly. No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)